No. 14,659

IN THE

United States Court of Appeals

For the Ninth Circuit

HERALD E. STRINGER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska, Third Division.

REPLY BRIEF OF APPELLANT.

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I.

ARGUMENT.

1.

FINDINGS OF FACT.

The Findings of Fact appear in full on pages 8 and 9 of appellant's opening brief.

Finding of Fact II is set forth on page 8 of appellant's opening brief.

It states in substance and effect that the defendant, Herald E. Stringer, in the Federal Jail, contracted with Robert L. Kemp to defend him in a white slavery case for a fee of $500.00.

There is no testimony in the record that appellant visited Kemp in jail on any other occasion. Whatever

else may have been discussed between Kemp and appellant at that time, it will be conceded that the matter of arranging bail *was* discussed.

On the trial of the case both Kemp and his friend Vernon Oscar Rollins testified positively that during the discussion between appellant and Kemp at the jail, appellant agreed to defend Kemp on the white slavery charge for a fee of $500.00.

On cross-examination Rollins repudiated his testimony on direct examination, and swore that he never heard it mentioned at the jail, by Stringer or anyone else; that he heard it mentioned by Jim Lewis before he went to the jail.

Brief of Appellant pp. 17-18, Tr. p. 875.

The trial commenced June 17, 1954. In our opening brief we did not call attention to the fact that we took Kemp's deposition on September 22, 1953, nine months before Kemp testified at the trial.

Kemp's recollection as to the circumstances of his employing appellant Stringer to defend him was presumably better when his deposition was taken than nine months later, and especially because Ass't. U. S. Attorney Talbot had interviewed him for 10 or 15 hours a few days before his deposition was taken, necessarily refreshing his memory as to Stringer's employment.

Tr. Vol. II, p. 222.

Yet nowhere in a 24 page deposition did Kemp state that a $500.00 fee was agreed upon or even mentioned at the jail, although he was questioned

expressly as to whether anything was said, at the jail, about a fee.

Tr. Vol. I, p. 11.

If an agreement for a $500.00 fee had been made at the jail Kemp could not possibly have failed to mention it in his deposition.

There were two informations against Stringer filed in this case. Ass't. U. S. Attorney Talbot drew them both. The first was signed by U. S. Attorney Seaborn J. Buckalew on September 15, 1953.

It was admitted in evidence as Defendant's Exhibit A.

Tr. Vol. III, p. 465.

Immediately after Kemp's deposition was taken, September 22, 1953, Talbot drew the information on which the case was tried.

In that information there was no allegation that a contract for a fee of $500.00 was made in the Federal Jail.

In neither the first or second information was there any allegation that a contract for a fee of $500.00 was made in the Federal Jail.

The inevitable conclusion is that no such contract was made in the Federal Jail; that whatever contract was made between Stringer and Kemp, as to the fee to be charged for the defense of Kemp, was made in the appellant's office, and when the parties were dealing at arm's length.

After being released from jail and before going to Stringer's office Kemp went to the Radio Cab office

and asked James Lewis what to do about employing counsel. He did not mention anything about having already hired Stringer for $500.00.

Appellant's Opening Brief, pp. 15-16.

If an agreement for a fee of $500.00 had been made at the jail, Kemp could not possibly have failed to tell Lewis about it. As shown above, he could not possibly have failed to mention it in his deposition.

Finding of Fact II is based solely upon Kemp's testimony. Vernon Oscar Rollins repudiated his corroborating testimony.

In the Court's opinion, Vol. I, p. 121, it is stated,

"Although the witness Kemp was impeached in certain respects, his testimony was not completely deprived of value."

Kemp *was* impeached *in certain respects* by his own inconsistent and contributory statements.

He was impeached by several highly reputable witnesses, including an Ass't. U. S. Attorney, the Chief Deputy Marshal, and the Chief of Police, as to moral character, and truth and veracity.

He was corroborated by no one, as to any material fact in dispute.

This impeached government witness was, in the language of Ass't. U. S. Attorney, James Fitzgerald,

"The only one important government witness."

Tr. Vol. IV, p. 947.

On the testimony of Kemp and Kemp alone, the Court based Finding of Fact II.

Finding of Facts II and VII are the two most important Findings in the case. Finding VII is, in effect, that James Lewis acted for the defendant Stringer in his dealings with Kemp. There is not one scintilla of evidence to support Finding of Fact VII.

There is no allegation in the information that Lewis was Stringer's agent.

The name Lewis is not even mentioned in either of the informations.

Nowhere in Appellee's Brief is it argued that the Court's Findings of Fact are justified by the evidence in the case.

Likewise in the trial of the case, when at the conclusion of the arguments, the trial court repeatedly pressed the U. S. Atty. to express his opinion and make a recommendation as to how the case should be decided, the U. S. Attorney refused to do so.

Vol. IV, pp. 937-941.

Finally after several conferences with his assistants the U. S. Attorney made the statement appearing in the record.

Vol. IV, pp. 940-941.

In the Conclusion of Appellee's Brief it is stated, page 40,

"It was in the Judge's discretion to give the testimony of the witnesses such credibility and weight as appeared to him to be justified."

It was not only in the Judge's discretion, it was his duty to give the testimony of the witnesses such credence as appeared to him to be justified.

But to sustain the Court's Findings there must have been at least some substantial credible evidence in support of Kemp's. There was no such evidence.

In fact the testimony of Kemp was demonstrated to be of no value whatever, having been conclusively impeached as heretofore shown.

The U. S. Attorney rests on the record, but does not point out wherein the record sustains the Findings of Fact.

2.

MISCONDUCT OF THE COURT.

Appellee's Brief asserts that appellant made a "most serious charge of misconduct against the trial judge" which on the record was not justified. This assertion refers to pages 56-58 of Appellant's Brief.

In support of Appellee's above assertion Appellee cites *Montrose Contracting Inc. v. Westchester County,* 94 F. 2d 550, and *Ochoa v. United States,* 167 F. 2d 341.

The first case cited upholds the right and duty of the court to participate in the examination of witnesses when the exigencies of the case require it—See opinion, 94 F. 2d p. 583 (6).

In the second case cited it is held that, "A federal judge has right and duty to facilitate by direct participation the orderly progress of a trial, and queries which aid in clarifying testimony of a witness, expe-

dite examination or confine it to relevant matters are proper if made in a nonprejudicial manner."

Ochoa v. U. S., 167 F. 2d 341, syllabus 3.

Appellant's Brief charged *undue* interference and participation in the examination of witnesses in violation of Canon 15 of the Canons of Judicial Ethics. The record justifies that charge.

As stated on page 58 of Appellant's Brief, since the Judge, "had assumed the right to act as prosecutor it was consistent with that assumption that he interview all his witnesses, during recesses, in chambers, or anywhere else. If he had the right to act as prosecutor, he had all the rights and duties of a prosecutor."

The trial judge did take over the conduct of the case. If laxity of the prosecution required such action, he was justified, since he could not completely prosecute without a pre-examination of the government witnesses.

It *was* consistent with his assumption of the role of prosecutor, that he interview his witnesses.

Appellant's charge is that there was no excuse for this conduct. The exigencies of the case did not require it.

At the conclusion of the trial he complimented the U. S. Attorney's office for its vigorous prosecution of the case.

Tr. Vol. IV, p. 934.

Appellant agrees with most of the legal principles supported by citations in Appellee's Brief.

In Re Salus, 184 A. pp. 69-70, is cited in support of the proposition that certain evidence was held sufficient to sustain a decree of disbarment for unprofessional conduct in employment and payment of runners to solicit business.

Appellee's Brief, p. 32.

Counsel for Appellant agrees with the decision in the *Salus* case but were not aware that Mr. Stringer was charged with employing a "runner" to solicit business.

There was an insinuation to that effect made by the trial judge.

Appellant's Brief, p. 41.

There was no testimony in support of such an accusation and no Finding of Fact to that effect.

The insinuation was unwarranted, and attention was called to it in Appellant's Brief for the purpose of showing the court's hostility to Stringer, which it did show.

Appellee cites *Wilhelm's* case, 112 A. 560, 562.

Appellee's Brief, p. 32.

Appellant agrees that the evidence in *Wilhelm's* case supported the Findings of Fact.

Appellee cites *Utz and Dunn Company v. Regulator Company,* 213 F. 315, and *Voltman v. United Fruit Company,* 147 F. 2d 514.

Appellee's Brief, p. 36.

These decisions announce correct legal principles.

But appellant's complaint against Judge McCarrey is that he erred in entering upon the trial of the case

when being of the opinion that it was improper for him to sit on the trial, as he had repeatedly stated that he would require the defendant Stringer to prove his innocence. Appellant did consent to being tried by Judge McCarrey. Appellant and his counsel believed that he could establish his innocence, and now believe that his innocence was established as has been demonstrated in Appellant's Brief.

Appellee cites *Gulf Refining Co. of Louisiana v. Phillip,* 11 F. 2d 961, and *Philadelphia and T. R. Co. v. Stinson,* 39 U.S. 448, as authority for the principle that a trial judge can in his discretion allow a case to be reopened after both litigants have rested only if he feels such evidence is necessary.

Appellant Stringer asked that an Exhibit be admitted which corroborated his oral testimony. It was grossly unfair of the trial judge to refuse this request, as has been demonstrated in Appellant's Brief.

Counsel for appellant reiterate that the appellant did not have a fair trial.

Counsel for appellant are mystified by the last paragraph preceding Appellee's Conclusion, on page 40 of Appellee's Brief, particularly the language,

"This appeal should not be the occasion or provide, perhaps, the opportunity to make such charges."

This appeal is taken for the sole purpose of reversing the judgment of the trial court.

II.

CONCLUSION.

Appellant believes that it has been demonstrated to this appellate court,

First: That the Findings of Fact are not founded on substantial evidence.

Second: That appellant did not have a fair trial.

Appellant rests upon the record to reverse the judgment of the trial court.

Dated, Anchorage, Alaska,
April 11, 1956.

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